Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Local Competition	)	
Provisions in the Telecommunications Act	)	CC Docket No. 96-98
of 1996	)	

COMMENTS OF AT&T CORP.

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May 20, 1996

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SUMMARY

AT&T's Comments address the dialing parity, number administration, access to rights of way and notice of technical changes provisions of Section 251 of the Telecommunications Act of 1996. Both the 1996 Act and the Commission's NPRM properly recognize the importance of these subjects to the development of local competition. As directed by Section 251(d) of the 1996 Act, it is essential that the Commission adopt explicit national rules implementing these statutory provisions, to ensure the attainment at the earliest possible time of the Act's objective of creating the necessary conditions for local competition.

As the NPRM confirms, alternative carriers will not be able to compete unless they can offer services that are as accessible as those of the incumbent. That is why the 1996 Act makes dialing parity one of the mandatory duties of LECs, and one of the important preconditions to permitting a BOC to provide in-region, interexchange services. The Commission should adopt a uniform, nationwide method and implementation schedule for toll dialing parity, to ensure that its benefits are both fully and expeditiously realized.

More specifically, the Commission should require all Tier 1 LECs to provide dialing parity using the "Full 2-PIC" presubscription method. In contrast to other methods, such as "Modified 2-PIC," the Full 2-PIC method maximizes customer choice by giving the customers the flexibility to choose different carriers for local, intraLATA toll and interLATA toll calls. The software necessary for Full 2-PIC is currently available and can readily be deployed. The other method mentioned in the NPRM, "Smart-PIC," has not been adequately developed or tested.

The Commission should adopt an explicit, nationwide schedule, as follows. It should adopt its two-year old proposal in CC Docket 92-237 to require 1+ presubscription

(using the Full 2-PIC method) for all interstate, intraLATA calls. Except as provided in Section 271(e) (2)(B) of the 1996 Act, the Commission should require all Tier 1 LECs to implement Full 2-PIC presubscription for all toll calls by January 1, 1997. Other LECs should be required to provide dialing parity through Full 2-PIC presubscription within six months of a bona-fide request from a competing toll carrier.

The Commission should also adopt its proposed definition of "nondiscriminatory access"to operator services, with two clarifications. First, the Commission should make clear that its proposed definition of operator services applies solely to the dialing parity provisions of the 1996 Act. Otherwise, ILECs might use this definition to exclude operator services from their resale obligations, contrary to Section 251(c)(4) and the Commission's intent. Second, the term "nondiscriminatory access" should mean that customers are able to connect to a carrier's operator services by dialing "0," 0+ the telephone number," or "00," to ensure that carriers are able to offer a full range of operator services. The Commission should also adopt its proposed definitions and rules regarding "nondiscriminatory access" to directory assistance and directory listings.

With respect to number administration, AT&T agrees that the Commission's NANP Order could satisfy the requirements of Section 251(e)(1) of the 1996 Act, but notes that its implementation is well behind schedule. The Commission needs to take an active role in ensuring the complete and timely implementation of the NANP Order, and should begin by promptly convening the North American Numbering Council.

The Commission also needs to adopt rules to implement the 1996 Act's provisions requiring nondiscriminatory access to LEC pathways. Both the structure and purpose of the Act require that the Commission adopt a broad definition of "poles, ducts,

conduits and rights-of-way" to encompass all pathways used by the LEC in serving customers, whatever specific form they may take, including entrance facilities, telephone closets or equipment rooms. Such a definition is necessary to prevent incumbent LECs from foreclosing facilities-based competition for particular customers, buildings or neighborhoods.

The Commission should also define "nondiscriminatory access" to mean access equal to what the utility provides to itself and to anyone else. If a utility has spare capacity available, it must make that capacity available to competitors upon request. If spare capacity is not immediately available, LECs are required to free up or create such capacity. In this regard, the Commission cannot overlook the distinction drawn by Section 224(f) between "utilities providing electric service" and other utilities (such as LECs). Only the former may deny access to pathways because of insufficient capacity.

These provisions of the 1996 Act also require the Commission to establish cost allocation standards where LECs must expand capacity in order to accommodate requests by carriers, and to order utilities to provide carriers promptly upon request their cable plats and conduit prints showing the nature and location of their poles, cables and conduits, etc. These documents are critically important for route planning in connection with offering service in new areas. The Commission should also adopt standards regarding the timing and manner of notice of "owners' modifications" to a pathway, and the recovery of the costs of such modifications.

Although the Commission has decided that it need not immediately issue new or revised regulations pole attachment rates, the Commission should nevertheless adopt standards in this proceeding to implement Section 224(g) of the Act, which requires that a utility charge carriers the same rate that it charges itself for pole attachments. To enforce this provision, the

Commission should require not only that a utility impute to itself the rates it charges other LECs, but that these rates be tariffed or otherwise publicly disclosed.

Finally, AT&T supports in their entirety the rules proposed in the NPRM to implement the statutory provisions (see § 251(c)(5) requiring incumbent LECs to provide public notice of technical changes.

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COMMENTS OF AT&T CORP.

Pursuant to Section 1.415 of the Commission's Rules, and the Notice of Proposed Rulemaking, FCC 96-182, released April 19, 1996 ("NPRM"), AT&T Corp. ("AT&T") respectfully submits these further comments on the rules that should adopted to implement the duties that have been imposed on local exchange carriers by Section 251 of the Communications Act of 1935, as amended by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) ("1996 Act").[1]

In accordance with the NPRM, AT&T's comments here are limited to rules that the Commission should adopt to implement the provisions of the 1996 Act concerning dialing

[1] On May 16, 1996, AT&T filed comments ("May 16 Comments") in response to sections of the NPRM addressed to access to and pricing of unbundled network elements, interconnection, and collocation, as well resale, the duty to negotiate, and availability of interconnection agreements to other carriers.

parity, number administration, access to rights-of-way, and notice of technical changes. These provisions of the 1996 Act, like the ones addressed in other sections of the NPRM, are critical to the development of local competition. Further, for the reasons explained in AT&T's May 16 Comments, the Commission has both the right and the duty to establish explicit national rules to govern their implementation.

I. THE COMMISSION SHOULD ADOPT RULES ENSURING THE PROMPT IMPLEMENTATION OF DIALING PARITY FOR LOCAL AND TOLL SERVICES.

Section 251(b)(3) of the Act requires LECs to provide "dialing parity" to competing providers of exchange and toll services. Section 3(39) of the Act defines "dialing parity" as the ability to provide telecommunications services in such a manner that customers may route automatically, without the use of any access code, their telecommunications to the carrier chosen by the customer. Both the NPRM and the Act recognize that dialing parity is essential to the development of competition for local and intraLATA toll services. As the NPRM confirms (¶ 202), alternative carriers will not viably emerge and compete unless they can offer customers services of sufficient quality and value -- including the ease of access to those services -- that rival the incumbent's services. That is why the Act (Section 271(c)(2)(B)(xii)) makes dialing parity one of the mandatory duties of LECs, and one of the important preconditions to permitting a BOC to provide in-region, interexchange services.

To implement the dialing parity requirement, the NPRM seeks comment on the services to which it applies (¶ 206), the method by which it should be implemented (¶¶ 209, 210), and an appropriate implementation schedule (¶ 213).[2] As explained below, AT&T believes that the Commission should require all Tier 1 LECs to provide dialing parity for local and toll services using the "Full 2-PIC" presubscription method by January 1, 1997.

A. The Commission Should Adopt Rules Ensuring Dialing Parity For Local And Toll Services.

The NPRM properly concludes that LECs should provide dialing parity for all telecommunications services -- local and toll, intrastate and interstate. Dialing parity allows customers to choose between carriers based upon the relative quality, prices and features they offer, unimpeded by concerns about ease of access. Dialing parity has thus produced enormous consumer benefits in the interexchange market, including a wide selection of carriers and service offerings, lower prices, accelerated technological advancements, and improved quality. Section 251(b)(3) of the Act now seeks to extend these benefits to local exchange and intraLATA toll services.

To ensure that the benefits of dialing parity are achieved, the Commission should make clear that dialing protocols for exchange and toll services may not differ

[2] The NPRM also requests that parties re-file in this docket their comments filed in Administration of the North American Numbering Plan, (Phase II), CC Dkt. 92-237, Notice of Proposed Rulemaking, 9 FCC Rcd. 2068 (1994) ("NANP NPRM"), that address intraLATA toll dialing parity. Annexed as Attachments A and B are AT&T's Comments and Reply Comments in that proceeding.

depending on the identity of the customer's service provider, and that a customer may not be required to use any digit or dialing protocol to access or use the services of a competing carrier that would not be required to access or use the same services provided by another carrier.

Further, to facilitate the prompt introduction of dialing parity, the Commission should adopt a uniform, nationwide method of and schedule for implementation for toll dialing parity. See NPRM, ¶ 10. In this regard, the Commission may draw from its successful experience with interLATA dialing parity and equal access, which were achieved pursuant to such a schedule. The alternative would result in unnecessary duplication by different states, customer confusion, and require entrants seeking to offer regional and national services to comply with an array of differing state standards and timetables.

With respect to methodology,[3] AT&T concurs with the Commission's conclusion (¶ 207) that dialing parity for toll calls can best be achieved through presubscription.[4] Presubscription has promoted competition and customer choice in the interexchange market, and can similarly expand customer choice in the intraLATA toll market. To maximize customer choice, the Commission should require implementation of the "Full 2-

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[3] The NPRM concludes that dialing parity for local calls will be achieved through Act. NPRM, ¶ 207, n.284. Unbundling, number portability, and the interconnection requirements of Section 251 of the Act. NPRM, ¶ 207, n.284.

[4] Presubscription, as the NPRM notes (¶ 207), is the process by which a customer preselects a carrier, to which all "1+" calls of a particular category of service are routed. The Commission should require presubscription for intraLATA toll and interLATA toll services only. A separate "breakdown" of interLATA traffic into domestic and international categories is unnecessary.

PIC" presubscription method.[5] "Full 2-PIC" will allow a customers to designate any IXC as its primary carrier for intraLATA toll calls, regardless of the carrier it has chosen for local or interexchange calls. In contrast to the "Modified 2-PIC" method, Full 2-PIC ensures that intraLATA toll calls are not simply "added on" to local or interLATA calling. Moreover, the software necessary for Full 2-PIC is currently available and can readily be deployed.[6]

Thus, except as provided in Section 271 (e)(2)(B), the Commission should require all Tier 1 LECs to implement dialing parity, utilizing the Full 2-PIC method, by January 1, 1997.[7] The Commission may permit LECs to seek an extension of this deadline for specific end offices by filing a petition to a state commission, which should be granted only

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[5] Indeed, the Commission should require "Full 2-PIC" dialing parity as part of the implementation of a larger, uniform "1+" ten-digit dialing plan for all domestic toll calls, as the Commission earlier proposed. See NANP NPRM, ¶ 43. The adoption of the uniform dialing plan will build upon the work of the 43 states that have already implemented 1+ ten-digit dialing, and ensure customers continued ability to distinguish between local and toll calls.

[6] The Commission should prohibit the use of any implementation method that restricts customer choice as compared to Full 2-PIC. Such methods unnecessarily narrow customers' ability to choose among toll service providers at precisely the time markets for all toll services should be opened fully to competition. The "Modified 2-PIC" method, for example, transforms intraLATA toll service into an adjunct either of local or interexchange service, and precludes customers from selecting a different carrier for their intraLATA toll calls. The other presubscription method mentioned in the NPRM (¶ 210), "smart-PIC," remains to be developed and tested, but may warrant consideration by the Commission in the future.

[7] The Commission should also immediately adopt the proposal in the NANP NPRM to require 1+ presubscription (using the Full 2-PIC method) for all interstate, intraLATA calls. Prompt action is clearly warranted: the issue of presubscription of carriers for such traffic has been under consideration for at least two years, and the record conclusively shows that there is no reason to continue to deny customer choice or reduce carrier competition with respect to this traffic.

upon a showing of good cause, and only for the period for which such showing has been made. In the event that an extension is granted, the LEC receiving it should be required to provide a discount reflecting the substantially inferior access provided to competing carriers from such offices.[8] Non Tier 1 LECs, and LECs serving United States possessions and territories under the Commission's jurisdiction, should be required to provide dialing parity within six months of a bona-fide request from a competing toll carrier.

As the NPRM (¶ 213) appears to recognize, neither the Act nor its underlying purposes require the Commission to establish rules or procedures, such as balloting, to govern the manner in which customers will choose among competing service providers.[9] If the intraLATA toll market is properly opened to competition, each carrier can choose for itself

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[8] In Michigan, the Public Service Commission has concluded that a 55% discount is appropriate for end offices that have not converted to the "Full 2-PIC" method in accordance with the Commission's schedule. See Application of MCI Telecommunications Corp. Against Ameritech Michigan and GTE North Inc. Relative to Their Not Making IntraLATA Equal Access Available in the State of Michigan, Opinion and Order, Case No. U-10138, Remand, p. 44, March 10, 1995. In New Jersey, the Board of Public Utilities has similarly proposed a 55% discount for end offices that have not timely converted to "Full 2-PIC." Investigation of IntraLATA Toll Competition for Telecommunications Services on a Presubscription Basis, Order Approving Presubscription and Proposal of Rules, Dkt. No. TX94090388, p. 40, December 14, 1995.

[9] The Commission should of course intercede in those instances where abuse of the notification process occurs. ILECs should not, for example, be permitted to use their provision of exchange service to influence toll PIC choices. In addition, the Commission should make clear that PIC "freezes" must be specific to interLATA or intraLATA traffic. This is necessary to prevent incumbent carriers from automatically extending interLATA PIC "freezes" to intraLATA toll PICs. See, e.g., MCI Telecommunications Corp., AT&T Corp., and LCI International Telecom Corp. vs. Illinois Bell Telephone Company d/b/a Ameritech Illinois, Sprint Communications Company L.P. vs. Illinois Bell Telephone Company, Case Nos. 96-0075, 96-0084 (consol.), Order, pp. 4-6, 10, April 3, 1996.

how to reach and educate customers on carrier choice. To the extent the Commission nevertheless decides to adopt rules, it should extend to intraLATA presubscription the rules developed for interLATA presubscription and equal access.

Finally, the NPRM (¶ 219) seeks comment on standards and methods for recovering the costs of implementing dialing parity. To ensure that cost recovery is not abused to undermine toll competition or customer choice, the Commission should confirm that carriers may not recover more than the incremental costs directly associated with implementation of dialing parity. The Commission should explicitly exclude (a) recovery of amounts intended to reimburse an incumbent carrier for revenues it expects to lose as a result of implementing dialing parity or introducing competition, as well as (b) costs associated with network upgrades that are not necessary to implement dialing parity, or which are undertaken for other or additional reasons. Finally, to ensure that the recovery mechanism complies with the statutory requirement of competitive neutrality, the Commission should mandate assessment of an "Equal Access Recovery Charge" ("EARC"), on all providers of toll service, including the incumbent, based on minutes of use subject to dialing parity. This charge should be tariffed as a rate element that is separate from any access charges, and approved by the state commission. As with interLATA presubscription, these costs should be amortized over a period not to exceed 8 years.[10]

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[10] To facilitate verification of compliance with these requirements, LECs should be required to file an annual report with the state commission categorizing and quantifying costs incurred to implement dialing parity (annually and cumulatively), as well as the amount of those costs

(footnote continued on following page)

II. THE COMMISSION SHOULD ADOPT UNIFORM RULES TO ENSURE FAIR, EFFICIENT, AND NONDISCRIMINATORY ACCESS TO OPERATOR SERVICES, DIRECTORY ASSISTANCE, DIRECTORY LISTING, AND NUMBERING RESOURCES.

Section 251(b)(3) of the Act also requires that LECs provide "nondiscriminatory access" to operator services, directory assistance and directory listing, and telephone numbers. This requirement is intended to ensure that customers have equal access to these vital features and adjuncts regardless of the carrier they choose.

A. Nondiscriminatory Access To Operator Services.

AT&T concurs with the NPRM's (¶ 216) proposed definition of operator services, provided that it is limited to that term as used in Section 251(b)(3).[11] Unless the definition is explicitly so limited, some ILECs may claim that they are not obligated to make operator services which include transmission available for resale at a wholesale rate, contrary to Section 251(c)(4) of the Act.

(footnote continued from previous page)

which have been recovered. Such reports should be required for as long as the LEC seeks to recover implementation costs.

[11] The NPRM (¶ 216) defines such services as "any automatic or live assistance to a customer to arrange for billing or completion or both of a telephone call through a method other than: (1) automatic completion with billing to the telephone from which the call originated, or (2) completion through an access code by the consumer, with billing of an account previously established with the telecommunications service provided by the consumer." AT&T believes that this definition includes such traditional functions as "Emergency Interrupt," "Busy Line Verification," and "Operator-Assisted Directory Assistance," which constitute assistance to customers seeking to complete calls. AT&T also notes the statement in the NPRM that the proposed definition is solely "[f]or purposes of [Section 251(b)(3)]."

The NPRM (id.) also properly construes the term "nondiscriminatory access" to operator services to mean that a local exchange customer must be able to connect to a local operator in the same manner, regardless of the identity of the customer's local service provider. But the the Commission should clarify certain aspects of its definition of "nondiscriminatory access." Specifically, "nondiscriminatory access" should mean that customers are able to connect to a carrier's operator services by dialing "0," "0+ the telephone number," or "00," and not simply through "0" and "0+" protocols, as the NPRM (¶ 216) proposes.[12] These capabilities will enable carriers (who so choose) to provide the full range of operator services, and will minimize customer confusion concerning providers of, and rates for, operator services.[13]

B. Nondiscriminatory Access To Directory Assistance And Directory Listing.

AT&T agrees with the Commission's tentative conclusion that "nondiscriminatory access" to directory assistance and directory listing means that a LEC's

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[12] "Nondiscriminatory access" should also require that equal opportunities for "branding" are made available. If an incumbent carrier "brands" its own operator services with announcements, it should ensure that other operator service providers have the capabilities to do the same. In the event that this cannot be achieved for technical or other reasons, the incumbent carrier should not "brand" its service at all. This nondiscrimination requirement should apply equally to directory assistance.

[13] There is no need for the Commission to require that operator services, as defined by the Commission "[f]or purposes of this [Section 251(b)(3)] provision," be made available for resale. To the extent that a local exchange carrier provides transmission with, or as part of, its operator services, the service must be made available for resale under Sections 251(b)(1) and 251(c)(4) of the Act.

customers must be able to access any other LEC's directory assistance, and obtain directory listings, in the same manner, regardless of the service provider of the inquiring or listed party.

The obligation to provide "nondiscriminatory access" to directory assistance requires that all local exchange customers be able to reach directory assistance by using the same dialing protocols (i.e., 411 or 555-1212), as other customers of a local exchange carrier in a given local service area. While alternative dialing protocols (e.g., 1-900-555-1212) can be permitted for those carriers wishing to use them, no carrier should be required to use them.

The obligation to provide "nondiscriminatory access" to directory listings means that LECs must accept, for inclusion in directory listings and associated databases, information for residential and business customers of all other LECs. This information should be processed and included within the directories and associated databases in the same manner for all customers.[14] Further, to the extent that an ILEC offers additional or enhanced directory listings, they should be made available to all exchange carriers at the same rates and terms.

C. Impartial Number Administration.

Section 251(e)(1) of the Act requires the Commission to create or designate an impartial entity to administer numbering resources and to make numbers available on an equitable basis. This Section also grants the Commission exclusive jurisdiction over those portions of the North American Numbering Plan that pertain to the United States, but permits

[14] The Commission should require such access for both White Pages and Yellow Pages directories. It is also necessary that, with respect to service providers, "customer guide" sections of directories should contain the same information for all local exchange carriers.

the Commission to delegate resolution of North American Numbering Plan issues to state commissions as it deems appropriate.

The NANP Order requires the establishment of an entity that will impartially administer numbering resources.[15] Although the NANP Order could, if implemented, satisfy the requirements of Section 251(e)(1), AT&T notes that the timeline established therein has not been met. The North American Numbering Council (the "NANC"), for example, has not held its first meeting, though the NANP Order required it to do so in October 1995. To give full effect to the NANP Order, and, more fundamentally, to satisfy Section 251(e)(1), the Commission must promptly convene the NANC, and continue to take an active role in ensuring that the industry otherwise complies in all respects with the NANP Order.

Finally, the NPRM (¶ 256) suggests a workable sharing of authority between the Commission and state commissions. The Commission should continue its practice of delegating to state commissions matters involving implementation of new area codes, but condition such delegation on adherence to the principles identified in the Ameritech Order.[16]

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[15] See Administration of the North American Numbering Plan, (Phase II), CC Dkt. 92-237, Report and Order ("NANP Order").

[16] Proposed 708 Relief Plan and 630 Numbering Plan Area Code by Ameritech-Illinois, Declaratory Ruling and Order ("Ameritech Order"), 10 FCC Rcd. 4596 (1995). In that Order, the Commission determined, inter alia, that numbers must be made available on an efficient and timely basis to service providers, that administration of numbers should not unduly favor or disadvantage any particular industry segment, and that administration of numbers should not unduly favor or disadvantage one technology over another. Id. at 4604. The same rationale supports a requirement under Sections 251(c)(3) and 251(c)(4) of the 1996 Act that ALECs be provided the same access to line number assignment systems as ILECs provide to themselves or their affiliates.

This is an appropriate jurisdictional balance. To the extent that state commissions deviate from the Ameritech Order, aggrieved parties may petition the Commission, and, if warranted, obtain prompt corrective action. AT&T has no objection to Bellcore, state commissions, and ILECs continuing their current number administration functions, provided that those functions are not expanded and that the Commission ensures prompt compliance with the NANP Order.

III. THE COMMISSION SHOULD ADOPT RULES ENSURING BOTH NONDISCRIMINATORY ACCESS AND IMPUTATION OF RATES FOR POLE ATTACHMENTS.

Section 251(b) imposes a duty upon all local exchange carriers ("LECs") to provide access to "poles, ducts, conduits, and rights-of-way . . . consistent with Section 224." 47 U.S.C. § 251(b)(4); see 47 U.S.C. § 224. These sections govern the pathways that run under or above streets, across public or private property, and into multi-unit buildings, and that house the lines, facilities, and equipment used to originate and complete telephone calls. For decades, incumbent LECs have owned or controlled these pathways as a consequence of their status as franchised monopoly utilities.

The duties imposed in Sections 251(b) and 224 reflect the reality that new entrants must have equal access to rights-of-way if true facilities-based competition is to emerge. Amended Section 224 requires all "utilities" to provide "nondiscriminatory access" to cable companies and "telecommunications carriers," which are defined in Section 224(a)(5) to exclude incumbent LECs. Thus, Congress explicitly established an asymmetrical set of duties in Section 224(f) -- ILECs must provide nondiscriminatory access to ALECs or other telecommunications carriers, but not vice versa. The asymmetry reflects the Act's fundamental goal of creating local competition, and the fact that it would be impractical for

competing local exchange carriers to duplicate the system of pathways upon which incumbent LECs now rely. Building duplicative pathways could be physically infeasible, prohibitively expensive, environmentally damaging, or disruptive to local communities. Control over these rights-of-way thus stands as a quintessential bottleneck that can prevent competitors from establishing facilities to reach their customers. As the Commission observes, access to LEC pathways "is vital to the development of local competition." NPRM, ¶ 220. More broadly, the duty to provide access to rights-of-way is an essential component of the overall scheme of unbundling, interconnection, and resale that Section 251 sets forth as the means to create local competition. The Act requires not only that incumbent LECs resell services at wholesale rates, but that they provide access to and completely unbundle the elements of their network, so that competing LECs can use particular elements thereof as they build their own facilities. In this manner, entry costs are kept low, and competing LECs can evolve from resellers to true facilities-based competitors, just as some interexchange resellers have become, over time, facilities-based interexchange carriers.

Three subsections of Section 251 work together to make the entire LEC network available to competitors. Section 251(c)(3) grants access to unbundled network elements; Section 251(c)(6) makes all LEC premises used for network facilities available for collocation and interconnection; and Section 251(b)(4) mandates access to all of the remaining connecting pathways of the LEC network -- the "poles, ducts, conduits, and rights-of-way." Telecommunications carriers, including competing LECs must have full, nondiscriminatory access to all components of the local exchange if facilities-based competition is to develop as Congress envisioned.

Incumbent LECs can frustrate that access in two important ways: by denying access outright, or by imposing rates, terms, and conditions that effectively deny access. The Commission has indicated that it intends to focus in this rulemaking only on access issues, and to implement only Sections 224(f) and (h). NPRM, ¶ 221. It is equally important, however, that competing LECs obtain access to LEC pathways at rates that are nondiscriminatory, tariffed, and imputed to the LEC's own local exchange rates. Therefore, in order to "implement" effectively the requirements of Section 251(b)(4), the Commission must expand its focus and adopt rules addressing the tariffing and imputation of pole attachment rates.

A. The Commission Should Define "Poles, Ducts, Conduits, And Rights-Of-Way" Broadly To Include All LEC Pathways.

At the outset, the Commission should define "poles, ducts, conduits, and rights-of-way" broadly to include all pathways used to place facilities. Such a definition is necessary to clarify the scope of the duty imposed by Section 251 to provide access.

Neither the Act nor the Commission's current regulations define the terms "poles, ducts, conduits, and rights-of-way," but such terms are clearly of general applicability. Congress could not have anticipated or listed all of the possible kinds of pathways owned or controlled by utilities, and the Act instead contains a series of broad, somewhat overlapping terms that effectively encompass the full range of LEC pathways. This breadth reflects the fact that unless competing LECs have access to all pathways needed to serve their customers, in whatever specific physical form they take, the incumbent LEC can effectively shut off access to particular customers.

The structure of the Act reinforces this broad interpretation. Congress clearly intended to make the entire LEC network available on a disaggregated basis to competing

LECs seeking to become facilities-based competitors. As explained earlier, Congress accomplished this in three interrelated provisions: together, the rights-of-way section (§ 251(b)(4)), the collocation section (§ 251(c)(6)), and the unbundling section (§ 251(c)(3)) make all of the piece-parts of the incumbent LEC's network accessible to potential facilities-based competitors. Thus, Section 251(b)(4) governs access to any part of the incumbent LEC's property not governed by the collocation and unbundling sections.

The term "right-of-way," in particular, should be read to include all pathways or easements owned or controlled by a LEC. For example, the Commission should clarify that the term "right-of-way" encompasses not only easements across land, but also entrance facilities, telephone closets or equipment rooms (e.g., within commercial buildings or multi-unit dwellings); cable vaults, controlled environment vaults, manholes, or any other remote terminal (to the extent those are not located in central offices or other LEC structures covered by the collocation regulations under Section 251(c)(6)); risers; and any other pathway (or appurtenance thereto) owned or controlled by a LEC. Such a standard is necessary to prevent ILECs from effectively determining which customers competing LECs can serve with their own facilities.

B. The Commission Must Ensure That Competing LECs Have Nondiscriminatory Access To Pathways, And Must Clarify That LECs Are Not Permitted To Refuse Access On Grounds Of Insufficient Capacity.

The Commission seeks comment on "the meaning of 'nondiscriminatory access'" as that term is used in Section 224(f). NPRM, ¶ 222. The Commission should define "nondiscriminatory access" to mean access equal to what the utility provides to itself and to anyone else. The Commission should further establish standards that clarify the

responsibility of incumbent LECs to provide access to their rights-of-way and resolve outstanding questions concerning issues of notice of changes and cost allocation.

1. Principles of Access.

The Commission should establish that the duty in Section 224(f) to provide nondiscriminatory access has the following three elements:

1. If the utility has spare capacity available, it must make that capacity available to other telecommunications carriers upon request. The Commission should define spare capacity as any capacity in excess of what is currently needed by the utility efficiently to serve existing customers and what the utility has set aside for immediately foreseeable future use -- for example, within one year or less. The Commission should make clear that spare capacity includes what incumbent LECs have sometimes referred to as "reserve capacity," which they set aside against potential demand arising three, five or more years in the future. Utilities must not be permitted to hoard capacity for an uncertain future demand that other telecommunications carriers need to compete today.

2. If spare capacity is not immediately available, then LECs are required to free up or create such capacity. In this regard, it is important to emphasize that Section 224(f)(2) draws a distinction between "utilities providing electric service" and all other utilities (including LECs). Section 224(f)(2) expressly provides that "utilities providing electric service" may deny access for reasons of "insufficient capacity" or for "safety, reliability, and engineering purposes; it conspicuously declines, however, to offer such grounds for refusal to incumbent LECs (or any other nonelectric utility). The Commission should clarify that the Act does not permit utilities other than electronic utilities to deny

telecommunications carriers access to pathways because of insufficient capacity. Cf. NPRM, ¶ 223 (seeking comment on when a "utility" can deny access for insufficient capacity).

Given the enormous capacity that fiber optic cable offers, it is unlikely that true capacity constraints could ever legitimately justify a refusal to grant access to a pole, duct, conduit, or right-of-way. As noted above, the capacity used by the utility should be limited to what is needed for the utility efficiently to serve its existing customers and its immediate future demand. In most instances, claims of a lack of immediate spare capacity will simply reflect hoarding of "reserve" capacity or inefficient use of existing conduit. Utilities may be using cables housing twisted copper pairs, other obsolete material, or only a relatively few number of fibers (e.g., 12), instead of the maximum number of fibers (a typical 3/4 inch cable today houses 144 fibers and will likely accommodate substantially more in the near future). Existing conduit (which typically houses three such cables), if used efficiently, will accommodate the needs of competitors as well as of incumbent LECs. And existing rights-of-way typically will accommodate, where needed, additional ducts and conduit.

Finally, the Commission should adopt standards concerning when a "utility providing electric service" can deny access on grounds of "safety, reliability, and generally applicable engineering purposes." See NPRM, ¶ 223. Regardless of whether the Commission adopts quantifiable standards, at a minimum, the Commission should establish that the burden of proof in individual cases is on the utility to show that any alleged threat to safety, reliability, or engineering, is demonstrable, quantifiable, and cannot reasonably be accommodated. Such a standard is appropriate given that the LEC has the most efficient and comprehensive access to the relevant information, and given that the Act disfavors refusals to

provide access. Absent such proof, the utility should be required to make reasonable accommodations and provide access to the requesting entity.

3. Once a utility (including a LEC) has allowed a telecommunications carrier to obtain a pole attachment or occupy a conduit, and that carrier has paid whatever fee or compensation is appropriate and agreed-upon, the utility cannot evict that carrier in order to reclaim the space for another use. Such evictions would constitute access discrimination: unless the owner is willing to dismantle its own pole attachments (or abandon its conduit) to accommodate telecommunications carriers that are seeking access, it cannot insist on the removal of their attachments to accommodate its own attachments (or others').

ILECs have countless means at their disposal to evade the duty to provide access. Not only can a LEC deny access outright on any number of pretexts, but the LEC can also impose onerous conditions that have the effect of denying access. In all such situations, however, the Commission should make clear that the burden of proof is squarely on the utility to justify any effective denial of access. The Commission should also provide for expedited review of any complaints that access has been improperly denied. Expedited review is essential to prevent incumbent LECs from using the regulatory review process to their competitive advantage.

2. Additional Rules.

The Commission also should adopt standards to address the issues of expansion of capacity and disclosure of information.

First, the Commission should establish fair and reasonable cost allocation standards in situations where LECs must expand capacity in order to accommodate competing LECs. In the past, ILECs have typically forced the new occupying or attaching party to pay